

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56458; File No. SR-CBOE-2007-107]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Continuation of Temporary Membership Status From and After Commission Approval of a Pending Rule Interpretation Concerning Exercise Right Eligibility

September 18, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 10, 2007, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the CBOE. The Exchange has designated this proposal as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act³ and Rule 19b-4(f)(1) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to adopt new Interpretation and Policy .02 of CBOE Rule 3.19 that continues the temporary membership status provided to certain persons under existing Interpretation and Policy .01 of CBOE Rule 3.19 from and after any approval of SR-CBOE-2006-106.⁵ The text of proposed Interpretation and Policy .02 of CBOE Rule 3.19 is set forth below (since Interpretation and Policy .02 of CBOE

Rule 3.19 is completely new, its text is italicized).

Chicago Board Options Exchange, Incorporated Rules

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Rule 3.19. No change.

* * * Interpretations and Policies:

.01 No change.

.02 A person ("Temporary Member") who has been granted temporary membership ("Temporary Membership") status at the Exchange pursuant to Interpretation and Policy .01 of this Rule 3.19 shall continue in that Temporary Membership status after the Commission's approval of SR-CBOE-2006-106, if and only if such person (i) has not previously terminated that Temporary Membership status and remains in good standing as of the close of business on the trading day immediately before the date of that approval, (ii) thereafter remains in good standing and continues to pay all applicable fees, dues, assessments and other like charges that are assessed against CBOE members, and (iii) pays to the Exchange a monthly access fee set by the Exchange, which shall be due and payable in accordance with the provisions of the Exchange Fee Schedule. Such access fee shall be paid directly to the Exchange and shall not be escrowed.

The Temporary Membership status granted to a Temporary Member pursuant to this Interpretation and Policy .02 shall terminate upon the earlier of (i) the voluntary termination of that Temporary Membership status by the Temporary Member, (ii) the approval by the Commission of a further proposed rule change that provides for the termination of that status and the granting of trading permits or another form of trading access to Temporary Members, or (iii) the consummation of a transaction pursuant to which either CBOE is converted into a stock corporation or memberships in CBOE are converted into stock. Temporary Members shall be subject to the regulatory jurisdiction of CBOE under the Act, the Constitution and the Rules, including CBOE's disciplinary jurisdiction under Chapter XVII.

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed

rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange filed this proposed rule change with the Commission to continue the temporary membership ("Temporary Membership") status, including trading access, of persons ("Temporary Members") who currently enjoy that status pursuant to Interpretation and Policy .01 of CBOE Rule 3.19 from and after the time their current Temporary Membership status would otherwise terminate if the Commission were to approve SR-CBOE-2006-106. The underlying purpose of this proposed rule change is to ensure fair and orderly markets at the Exchange when as many as 229 former exerciser members cease to be eligible to remain members of the Exchange under Interpretation and Policy .01 of CBOE Rule 3.19, upon an approval of SR-CBOE-2006-106 by the Commission.⁶

Continuation of Temporary Membership Status

In SR-CBOE-2006-106, CBOE proposed an interpretation of paragraph (b) of Article Fifth of the CBOE Certificate of Incorporation ("Article Fifth(b)") to address the impact of the then-proposed acquisition of The Board of Trade of the City of Chicago, Inc. ("CBOT") by Chicago Mercantile Exchange Holdings Inc. ("CME Holdings") on the eligibility of persons who were members of CBOE ("exerciser members") pursuant to Article Fifth(b) (the right provided under this provision is sometimes referred to as the "exercise right").⁷ Under that interpretation, the consummation of the CME/CBOT Transaction resulted in no person any longer qualifying as a member of the CBOT within the meaning of Article Fifth(b) and therefore resulted in the elimination of any person's eligibility to qualify thereafter to become or remain an exerciser member of the Exchange.

⁶ According to the Exchange, there currently are 229 former exerciser members that qualify for temporary membership status under Interpretation and Policy .01 of CBOE Rule 3.19.

⁷ CME Holdings proposed to acquire CBOT by merging CME Holdings with CBOT Holdings, Inc. ("CBOT Holdings"), of which CBOT was a wholly-owned subsidiary (the "CME/CBOT Transaction"). The CME/CBOT Transaction was consummated on July 12, 2007.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(1).

⁵ See Securities Exchange Act Release No. 55190 (January 29, 2007), 72 FR 5472 (February 6, 2007). The Exchange filed SR-CBOE-2006-106 on December 12, 2006. On January 17, 2007, the Exchange filed Amendment No. 1 to the proposed rule change. Numerous comments were received, and the Exchange responded to those comments on June 15, 2007. On June 29, 2007, the Exchange filed a partial amendment, Amendment No. 2, to the proposed rule change.

Thus, if the Commission were to approve SR-CBOE-2006-106, and in the absence of any provision for continuing the membership status of such persons on a temporary basis after that approval, former exerciser members would cease to be entitled, among other things, to trade on the Exchange.

In SR-CBOE-2006-106, the Exchange stated that it was prepared to maintain the status quo for some period of time after the exercise right was terminated, in order to control the risk that the loss of exerciser members upon the termination of the exercise right might adversely affect liquidity in CBOE's market. The Exchange also stated that this result would be accomplished by staying, for an interim period of time, the impact of the termination of the exercise right on the trading access of those individuals who were exerciser members of CBOE on a designated cut-off date, and that this action would permit those individuals to continue to trade on CBOE in the capacity of CBOE members during that interim period. The Exchange indicated that this decision to stay the effectiveness of what otherwise would result in a termination of trading access was analogous to the right of the Exchange under CBOE Rule 3.19. The Exchange also indicated that this interim period would continue for so long as necessary to avoid any disruption to the market as a result of the loss of exerciser members, which could involve the Exchange adopting a plan to provide some form of trading access to such persons in the absence of the exercise right. In other words, the Exchange envisioned that this interim period would start upon the approval of SR-CBOE-2006-106, with the Exchange initially maintaining the status quo for former exerciser members, and could eventually involve the adoption of a plan to provide some form of trading access to former exerciser members through trading permits or some other form of substitute trading access rights, at which point the interim period would terminate and trading access would be provided under such substitute trading access rights. SR-CBOE-2006-106 contemplated that any such substitute trading access rights would require the approval of CBOE members under Section 2.1 of the Exchange's Constitution, and would be subject to the approval of the Commission under Section 19(b) of the Act.⁸

While SR-CBOE-2006-106 was pending before the Commission, the Exchange was faced with a situation that was not addressed in that filing,

when the CME/CBOT Transaction was consummated before the Commission had acted on SR-CBOE-2006-106. In response to that impending situation, the Exchange adopted Interpretation and Policy .01 of CBOE Rule 3.19 to provide temporary trading access to certain former exerciser members. Under that interpretation, these Temporary Members have been granted continued membership status on a temporary basis—including the right to trade—following the consummation of the CME/CBOT Transaction on July 12, 2007. However, under the express terms of that interpretation, that Temporary Membership status will terminate upon any approval of SR-CBOE-2006-106.⁹ The Exchange also indicated in the rule filing adopting Interpretation and Policy .01 that, as contemplated in SR-CBOE-2006-106, there would be a different temporary access plan to address transitional issues that would arise from the approval of SR-CBOE-2006-106.¹⁰

The Exchange is filing this proposed rule change to implement its original intention, as reflected in SR-CBOE-2006-106, to maintain the status quo for former exerciser members by providing them with an interim period of trading access after the approval of that filing. The Exchange believes that this rule change is appropriate to prevent any disruption that might occur in the Exchange's markets if former exerciser members suddenly lost all rights to trade on the Exchange if the Commission were to approve SR-CBOE-2006-106. To avoid the possibility of such a disruption, the Exchange proposes to provide interim trading access by adopting Interpretation and Policy .02 of CBOE Rule 3.19. This interpretation will extend the Temporary Membership status provided to Temporary Members under Interpretation and Policy .01 of CBOE Rule 3.19.¹¹ Under Interpretation

and Policy .02, this Temporary Membership status will be conditioned on the Temporary Member: (i) Not having previously terminated that Temporary Membership status and thereafter remaining in good standing, (ii) continuing to pay all applicable fees, dues, assessments and other like charges that are assessed against CBOE members, and (iii) paying to the Exchange a monthly access fee.¹²

The interim trading access plan contained in Interpretation and Policy .02 of CBOE Rule 3.19 addresses the extenuating circumstances that would be faced by the Exchange if SR-CBOE-2006-106 were approved and, by virtue of that approval, Interpretation and Policy .01 of Rule 3.19 ceases to apply. Although the Exchange in SR-CBOE-2006-106 indicated that its decision to stay the effectiveness of the termination of trading access upon the approval of that filing was "analogous" to the right of the Exchange under CBOE Rule 3.19, the Exchange subsequently has determined that it is appropriate to rely on CBOE Rule 3.19 itself to provide trading access to Temporary Members. Rule 3.19 allows the Exchange, if the Exchange finds extenuating circumstances, to permit a member to retain the member's membership status for such period of time as the Exchange deems reasonably necessary to enable that person to obtain a membership under those extenuating circumstances.

Because the Exchange's goal in providing interim trading access under Interpretation and Policy .02 of CBOE Rule 3.19 is to avoid any disruption to the Exchange's markets as a result of the sudden loss of Temporary Members, the Exchange proposes to continue the Temporary Membership status of Temporary Members without requiring any action by them and without requiring that they hold any particular interests in CBOT. Rather, the Exchange will determine who is an eligible Temporary Member under the provisions of this interpretation and will take appropriate action to ensure that those persons retain their Temporary Membership status. Of

exerciser members prior to the CME/CBOT Transaction.

¹² Interpretation and Policy .01 of CBOE Rule 3.19 requires, among other things, persons to have been exerciser members of the Exchange as of July 1, 2007 to qualify for the Temporary Membership status provided under that interpretation. This cut-off date was chosen to ensure that only those persons who had a *bona fide* interest in trading on CBOE qualified for the Temporary Membership status in Interpretation and Policy .01. For this reason, as well as the reasons given for adopting Interpretation and Policy .01, the Exchange believes that this cut-off date also is appropriate for Interpretation and Policy .02.

⁹ Interpretation and Policy .01 allows a Temporary Member to maintain Temporary Membership status at the Exchange if and only if such person (i) remains in good standing and continues to pay all applicable fees, dues, assessments and other like charges that are assessed against CBOE members, and (ii) pays to the Exchange a monthly access fee. A person who has voluntarily terminated a Temporary Membership is no longer a member in good standing, and consequently would cease to be eligible for the Temporary Membership status provided under that interpretation. If that person seeks to access the Exchange as a member of the Exchange after such a termination, that person will need to lease or purchase a transferable Exchange membership.

¹⁰ See Securities Exchange Act Release No. 56016 (July 5, 2007), 72 FR 38106 (July 12, 2007) (SR-CBOE-2007-77).

¹¹ As long as they remain Temporary Members, these persons will continue to possess all of the rights, and be subject to all of the obligations, of

⁸ 15 U.S.C. 78s(b).

course, Temporary Members will be subject to the regulatory jurisdiction of CBOE under the Act, the Constitution and the Rules, including CBOE's disciplinary jurisdiction under Chapter XVII.

The Exchange states that Interpretation and Policy .02 of CBOE Rule 3.19 does not trigger the membership vote provision found in Section 2.1 of the Exchange's Constitution. That provision applies only when the Exchange issues "new" memberships. In contrast, Interpretation and Policy .02 temporarily preserves the membership rights of existing Temporary Members if and as of the time that the Commission approves SR-CBOE-2006-106. Because the interpretation would not create any new memberships or trading rights, no membership approval is required under Section 2.1 of the Exchange's Constitution or otherwise.

Duration of Temporary Membership Status

CBOE Rule 3.19 provides CBOE with the authority to allow members to retain their membership status for such time as is reasonably necessary for such persons to obtain a membership under the extenuating circumstances that necessitated application of CBOE Rule 3.19. There are several extenuating circumstances that would continue to exist if the Commission were to approve SR-CBOE-2006-106. Most importantly, but for Interpretation and Policy .02 of CBOE Rule 3.19, any approval of SR-CBOE-2006-106 would cause the sudden loss of as many as 229 Temporary Members who then would be providing liquidity to the Exchange's markets.¹³ In addition, there is a strong likelihood that there will be an insufficient number of transferable Exchange memberships available for purchase or lease by Temporary Members upon that approval. In accordance with its original plan, as reflected in SR-CBOE-2006-106, the Exchange intends to offer trading permits or some other form of substitute trading access rights to Temporary Members after the approval of SR-CBOE-2006-106. However, given the current legal controversy surrounding the effect of that approval on the rights claimed by former exerciser members and by persons who assert the right to

become exerciser members,¹⁴ the Exchange does not believe it is possible at this time to formulate prudently such a trading rights plan and to submit it for Exchange membership approval, as required under Section 2.1 of the Exchange's Constitution. Instead, the Exchange intends to design that trading access rights plan after Commission approval of SR-CBOE-2006-106 should such approval be given, and possibly other developments, provide the Exchange with appropriate guidance about the legal backdrop that may affect the structure of that trading access rights plan. In light of these extenuating circumstances, the Exchange believes that it is reasonably necessary for Temporary Members to continue in place until such a well-defined trading access rights plan could be developed and put in place if the Commission were to approve SR-CBOE-2006-106. Accordingly, under Interpretation and Policy .02 of CBOE Rule 3.19, the Temporary Membership status granted to a Temporary Member would continue, absent voluntary termination of that Temporary Membership status by the Temporary Member, until the earlier of (i) the approval by the Commission of a further proposed rule change that provides for the termination of that status and for the granting of trading permits or other form of substitute trading access rights to Temporary Members or (ii) the consummation of a transaction pursuant to which either CBOE is converted into a stock corporation or memberships in CBOE are converted into stock (collectively, a "Demutualization Transaction"). Each of these events would grant trading permits or other form of substitute trading access rights to Temporary Members, and each would be subject to the approval of CBOE members under Section 2.1 of the Exchange's Constitution and to the approval of the Commission under Section 19(b) of the Act.¹⁵

Trading Access Fees

Currently, pursuant to Interpretation and Policy .01 of CBOE Rule 3.19 and the Exchange Fee Schedule, Temporary Members are required to pay a monthly access fee of \$4700 per month.¹⁶ The amount of this fee was based on the then-current monthly lease fees being paid to lessors of the interest that CBOT

denominates as a full CBOT membership, as reflected in published lease fee information. Because the Commission has not yet determined whether to approve SR-CBOE-2006-106, those fees are being held in an interest-bearing escrow account maintained by the Exchange, and will be distributed in a manner consistent with any Commission action on SR-CBOE-2006-106.¹⁷

If the Commission approves SR-CBOE-2006-106, former exerciser members no longer would have any right of trading access in the capacity of an exerciser member. However, pursuant to Interpretation and Policy .02, they would continue to have trading access to the Exchange as Temporary Members. Accordingly, it is appropriate that these persons pay the Exchange a fee for the temporary continued trading access that they will be granted, and an escrow no longer will be appropriate because the Commission will have approved SR-CBOE-2006-106. The Exchange therefore proposes that these monthly access fees be paid directly to the Exchange and that they not be escrowed.

The Exchange will modify the amount of the monthly access fee if SR-CBOE-2006-106 is approved. In this regard, absent Interpretation and Policy .02 of CBOE Rule 3.19, Temporary Members would need to lease (or purchase) transferable Exchange memberships to continue to have trading access to the Exchange after the approval of SR-CBOE-2006-106. The Exchange therefore believes that the appropriate amount of the monthly access fee after such approval should be an amount reasonably related to the current lease market rate for transferable Exchange memberships. The Exchange will file a rule change relating to that amount in a separate proposed rule change that will be filed with the Commission under Section 19(b)(3)(A) of the Act.¹⁸

Filing Pursuant to Section 19(b)(3)(A) of the Act¹⁹

The Exchange is filing Interpretation and Policy .02 of CBOE Rule 3.19 pursuant to Section 19(b)(3)(A) of the Act.²⁰ As was the case in respect of Interpretation and Policy .01, Interpretation and Policy +.02

¹³ According to the Exchange, as of September 6, 2007, approximately 17 of these Temporary Members were registered to trade on behalf of Designated Primary Market-Makers ("DPMs"), while 154 of them were registered to trade as Market-Makers, and 46 were registered to trade as either Remote Market-Makers or on behalf of Electronic DPMs.

¹⁴ In current litigation, purported representatives of such persons have claimed that their rights survive the CME/CBOT Transaction and would not be affected by approval of SR-CBOE-2006-106.

¹⁵ 15 U.S.C. 78s(b).

¹⁶ See Securities Exchange Act Release No. 56197 (August 3, 2007), 72 FR 44897 (August 9, 2007) (SR-CBOE-2007-91).

¹⁷ Under its proposed rule change, the Exchange would retain the access fees if the Commission approves SR-CBOE-2006-106, and the fees would be returned to the payor with interest if the Commission disapproves SR-CBOE-2006-106. See Securities Exchange Act Release No. 56016 (July 5, 2007), 72 FR 38106 (July 12, 2007) (SR-CBOE-2007-77).

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 15 U.S.C. 78s(b)(3)(A).

constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and therefore qualifies for filing under Section 19(b)(3)(A).²¹ According to Commission Rule 19b-4(b)(2)(ii),²² a “stated policy, practice or interpretation” means, among other things, “[a]ny statement made generally available to the membership of * * * or to persons having or seeking access * * * to the facilities of [the Exchange] * * * with respect to * * * the meaning * * * of an existing rule.” Interpretation and Policy .02 of CBOE Rule 3.19 is such a statement made to the entire membership of CBOE, and to those who are “seeking access” to CBOE, “with respect to the meaning of an existing rule”—namely, CBOE Rule 3.19. CBOE Rule 3.19 provides in general for the temporary continuation of a person’s membership status when that membership status is lost under “extenuating circumstances” and provides that the membership status may be continued for a period of time that the Exchange determines to be “reasonably necessary” to allow a substitute membership to be obtained. Interpretation and Policy .02 applies those general standards to the present situation. In particular, as more fully set forth above, the interpretation identifies several circumstances that would exist if the Commission were to approve SR-CBOE-2006-106 as qualifying as “extenuating circumstances” that make it appropriate to allow Temporary Members to continue in that membership status after that approval. In addition, the interpretation construes the duration of that continued Temporary Membership status that is “reasonably necessary” in light of those extenuating circumstances. The interpretation of those elements of CBOE Rule 3.19 is an interpretation of the “meaning of an existing rule” and therefore is appropriately submitted under Section 19(b)(3)(A).²³

Although the proposed rule change will be effective upon filing, it will not become operative, in accordance with its terms, unless the Commission were to approve SR-CBOE-2006-106. Accordingly, the actual implementation of Interpretation and Policy .02 of CBOE Rule 3.19 is dependent on Commission action on SR-CBOE-2006-106.

General Reasons Supporting the Proposed Rule Change

The Exchange believes that the proposed rule change preserves fair and orderly markets at CBOE by avoiding the sudden loss of as many as 229 Temporary Members who presently are contributing liquidity to CBOE’s markets. Moreover, the proposed rule change treats these Temporary Members fairly by avoiding the immediate termination of their trading access on the Exchange upon the approval of SR-CBOE-2006-106.

2. Statutory Basis

For the reasons discussed above, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁴ in general, and furthers the particular objectives of Section 6(b)(5) of the Act.²⁵ In particular, the proposed rule change is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁶ and paragraph (f) of Rule 19b-4 thereunder.²⁷ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and

arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2007-107 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2007-107. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room, on official business days between the hours of 10 am and 3 pm. Copies of the filing also will be available for inspection and copying at the principal office of CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2007-107 and should be submitted on or before October 15, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁸

Florence E. Harmon,
Deputy Secretary.

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²¹ 15 U.S.C. 78s(b)(3)(A).

²² 17 CFR 240.19b-4(b)(2)(ii).

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ 15 U.S.C. 78s(b)(3)(A).

²⁷ 17 CFR 240.19b-4(f).

²⁸ 17 CFR 200.30-3(a)(12).